90-624

No. _____

In the

Supreme Court of the United States

October Term, 1990

EDISON HOMES, INC.,
formerly ARDMOR, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should this Court review the Eighth Circuit's decision holding that the Commissioner of Internal Revenue was within its discretion in totally disallowing an addition to the taxpayer - petitioner's bad debt reserve under 26 U.S.C. § 166(f) (1982), repeated 100 Stat. 2361 (1986), and assessing a deficiency because not all of the debts alleged to be bad were proved to qualify for the addition?

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TABLE OF AUTHORITIES

REPORT OF OPINION BELOW

The case is reported below as Edison Homes, Inc. formerly Ardmor, Inc. v. Commissioner of Internal Revenue, 903 F.2d 579 (8th Cir. 1990), decided May 17, 1990, rehearing and rehearing for banc denied July 9, 1990, which is contained in the appendix to this petition.

JURISDICTION

The date of the opinion below was May 17, 1990, and the judgment was corrected nunc pro tunc by order of October 4, 1990. The timely petition for rehearing and rehearing en banc was denied by order of July 9, 1990. The statutory provision believed to confer jurisdiction to review the matter by writ of certiorari is 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution:

Amendment V

No person shall be held in answer for a capitol or to otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war and public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself; nor be deprived of life, liberty, or property without due proces of law; nor shall private property be taken for public use without just compensation.

Internal Revenue Code of 1954:

26 U.S.C. Section 166(c):

Reserve for bad debts.

In lieu of any deduction under subsection (a), there shall be allowed (in the discretion of the Secretary) a deduction for a reasonable addition to a reserve for bad debts.

26 U.S.C. Section 166(f)(1)(A):

Reserve for certain guaranteed debt obligations.

(1) Allowance of deduction. In the case of a taxpayer who is a dealer in property, in lieu of any deduction under subsection (a), there shall be allowed (in the discretion of the Secretary) for any taxable year ended after October 21, 1965, a deduction --

> (A) for a reasonable addition to a reserve for bad debts which may arise out of his liability as a guarantor, endorser, or indemnitor of debt obligations arising out of the sale by him of real property or tangible personal property (including related services) in the ordinary course of his trade or business;

(repealed, Pub.L. 9-514, Sec. 805(b), 100 Sat. 2361).

STATEMENT OF THE CASE

Petitioner Edison Homes,Inc. (hereafter Edison) was a dealer in new and used mobile homes, who sold its contracts to General Electric Credit Corporation (hereafter GECC). Edison remained liable for the accounts, in case of default, and Edison's president, Gerald Toberman, personally guaranteed all the accounts.

At the time in question, under 26 U.S.C. §§ 166(c) and 166(f)A, repealed by the Tax Reform Act of 1986, Pub. L. No. 99-514, Title VIII, §§ 805(a) and (b), 100 Stat. 2361 (1986), a taxpayer who sold real or personal property could elect to make a "reasonable addition to a reserve for bad debts" arising out of an obligation as a guarantor of debt obligations arising in the normal course

of business, in the Commissioner's discretion. This addition for future bad debts is in lieu of a deduction for past bad debts under 26 U.S.C. § 166(a).

In 1981, with the aid of a CPA, Edison took an addition to its bad debt reserve of $528,024, the total reserve being $774,152, or 3.5% of its outstanding liability to GECC. The addition was prompted by a number of factors, primarily a nation-wide deterioration in the economy with high interest rates and increased unemployment which, in turn, greatly increased Edison's and GECC's defaults and repossessions. Edison figured its total obligation as about $23 million, but since this included some unearned interest the amount actually owing was somewhat less; nevertheless the actual debt was large and many times more than the new bad debt reserve.

The Commissioner found that not all of the transactions by Edison were "sales" of property, even though Edison appeared and was considered the "seller" in all and was liable for all in case of default, because some of the sales were arranged by agents for commissions, which the Commissioner characterized as "brokered" transactions and disallowed. Despite Edison's use of a CPA, to whom Edison supplied the information for its return, the Commissioner found Edison negligent and assessed a negligence penalty. The tax deficiency was assessed at $251,665, plus a penalty of 5%, or $12,583, plus 50% of the interest due on $251,665. This disallowed all transactions, not only the so-called "brokered" sales.

The Tax Court upheld the Commissioner, holding that Petitioner had not

satisfied its burden of proving an abuse of discretion, and the Court of Appeals for the Eighth Circuit affirmed. Edison Homes, Inc. v. Commissioner, 903 F.2d 579 (8th Cir. 1990), rehearing and rehearing en banc denied July 9, 1990. (Appendix A-1 et seq.).

Petitioner contends that the Commissioner clearly abused his discretion by disallowing all transactions even though most, if not all, of those described at trial were ordinary sales which undoubtedly qualified, and on the others Edison and Toberman remained equally liable. This denial of any addition despite the evidence, solely in the Commissioner's discretion, denies due process of law.

REASONS FOR ALLOWING THE WRIT

Petitioner believes the decision of the Court of Appeals (like those of the Commissioner and the Tax Court before it) so far departs from and conflicts with the law as previously set forth by this Court in Thor Power Tool Co. v. Commissioner, 439 U.S. 522, 99 S.Ct. 773, 58 L.Ed.2d 785 (1979), that it virtually renders the concept of "discretion" meaningless, thus creating special and important reasons for review, within the meaning of Rule 17.1, Rules of the Supreme Court.

The evidence at trial showed without doubt that: 1) Petitioner was a seller of property, 2) Petitioner had actual bad debts for which it was fully liable in an amount (though not exactly

determined) well above the increased reserve, 3) economic conditions in the pertinent year were genuinely poor and adversely affected Petitioner in a drastic way. Therefore, even if the transactions which were found to be "brokered" rather than "sales" are excluded upon a technical reading of the statute as applicable only to sales, Petitioner's reserve addition was reasonable. (We do not here argue the issue of whether some sales were properly excluded, which involves a narrower question of fact and law, although it is important to recognize that Petitioner was fully liable for the bad debts on all the transactions, and thus the alleged failure of proof as to whether some were "sales" does not

affect Petitioner's actual liability on the debts, nor should it affect the tax consequences).

In Thor Power Tool Co. v. Commissioner, supra, this Court discussed the standards of reasonableness under this statute, and said that where a taxpayer "can point to conditions that will cause future debt collections to be less likely" than in the past, the taxpayer "is entitled to" an addition larger than might otherwise have been permitted. 439 U.S. at 550. In Thor Power Tool the Commissioner's disallowance was upheld because there was no evidence of such changed conditions; here by contrast the changed conditions (and actual bad debts) were undeniably proved.

The decision was based, instead, on the notions that 1) because some of the transactions were not, technically, sales, and 2) because the two types of transactions were not fully segregated and identified, therefore none of the addition would be allowed. This is not an exercise of discretion, but of arbitrariness, presaging anarchy disguised as "discretion." For if this decision stands, the Commissioner's power is inflated to the point where if it finds some defect in the proof as to the type or amount of the transactions, it can ignore all other transactions no matter how well proved.

What is more, the Commissioner not only found a deficiency, but imposed severe penalties which go well beyond

defeating the part of the addition found questionable, well beyond even Petitioner's entitlement to claim actual and proved bad debts, and take his property in the form of greatly increased tax penalty payments without due process. "Due process" cannot have become so threadbare a concept as to be synonymous with the Commissioner's whim, called discretion.

At the very least, Petitioner was entitled to a remand to the Tax Court to resolve any ambiguity that might have remained in the record as to which transactions qualified as sales, and as to the actual, allowable amount of these.

Although the statute in question has been repealed, the case is by no

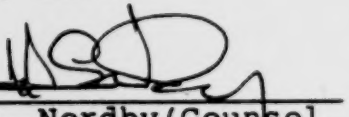
means moot, for Thor Power Tool, supra, remains as an authoritative discussion of "reasonableness" in the ever-important context of federal taxation, and the opinion of the Eighth Circuit in this case now stands as an inconsistent, confusing and deleterious gloss upon the Thor Power Tool decision, undermining the meaning of the perennially important idea of discretion.

CONCLUSION

For these reasons, petitioner respectfully prays that a writ of certiorari issue to review the decision below.

Respectfully submitted,

MESHBESHER, SINGER & SPENCE, LTD.



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Oct. 5, 1990 COUNSEL FOR PETITIONER

APPENDIX INDEX

United States Court of Appeals
For The Eighth Circuit

No. 89-1708

Edison Homes, Inc., formerly Ardmor, Inc.,	*	
Appellant,	*	
v.	*	Appeal
	*	from the
Commissioner of Internal Revenue,	*	United States Tax
	*	Court
Appellee.	*	

Submitted: February 15, 1990

Filed: May 17, 1990

Before LAY, Chief Judge, BEAM, Circuit Judge and WOODS, District Judge.

BEAM, Circuit Judge.

Edison Homes, Inc., taxpayer, appeals from a judgment entered by the United States Tax Court upholding a

deficiency in its 1981 income tax payments. The Commissioner disallowed taxpayer's deduction of $528,024 for an addition to its bad debt reserve under 26 U.S.C. § 166(f) (1982),[1] and assessed a tax deficiency of $251,665. The Commissioner also assessed Edison Homes with an addition to tax for negligence, pursuant to 26 U.S.C. § 6653(a) (1982). The tax court upheld the Commissioner's determination that taxpayer had not met its burden of proving that the Commissioner's disallowance of the deduction was unreasonable, or that the Commissioner's assessment of a penalty

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*The HONORABLE HENRY WOODS, United States District Judge for the Eastern District of Arkansas.

[1]Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1954 as in effect during 1981, the taxable year in question.

for negligence was improper. We affirm.

I. BACKGROUND

Edison Homes, Inc. is a dealer in new and used mobile homes. It began business in 1972, and has since done business under several names: Oronco Estates, Inc.; Ardmor, Inc.; and Edison Homes, Inc. Gerald Toberman has been president of Edison Homes since 1972, and its sole shareholders are his children, Barbara and William.[2]

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[2]Toberman testified that while his business has had three corporate names, it has been incorporated only once in the State of Minnesota, and that Oronco, Ardmor and Edison Homes are "all one and the same." Trial Transcript, at 53, 73. The business also used the name "Toberman Companies," although Toberman Companies was not a separate corporate entity and had no corporate officers. Id. at 80. The name "Toberman Companies" was apparently used in transactions involving used mobile homes. See Edison Homes, Inc. v. Commissioner, 56 T.C.M. (CCH) 203, 204 (1988).

As part of its business of selling new and used mobile homes, Edison Homes financed its sales through General Electric Credit Corporation, GECC. Bythe terms of various agreements, GECC purchased the accounts generated by the sale or lease of a mobile home. In the event of default by the buyer, Edison Homes remained liable to GECC for the account balance, less unearned finance charges. Toberman personally guaranteed all accounts.

Edison Homes based its addition to the bad debt reserve on all outstanding past due accounts with GECC. Edison Homes claims that its recourse liability on these accounts was over $23 million, and the record substantiates this figure. GECC maintains its accounts with Edison Homes under four separate dealer numbers.

Dealer number 7036 showed a balance of $11,817,229.90; number 7025 of $7,688,293; number 7026 of $1,030,658; and number 0315 of $2,716,751.17. These figures, however, include both principal and interest; the amount of principal alone is uncertain.[3] Testimony at trial suggested that the principal due on these dealer numbers was probably about one half of the total balance.

As an accrual basis taxpayer, Edison Homes elected, in its 1981 return, to take a deduction for an

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[3]The amount of principal was established at trial for two of the accounts. Principal for dealer number 7036 amounted to $5,540,883.648 and to $863,163.43 for dealer number 0315. No figures were available for the other two dealer numbers. This distinction is important in determining whether the addition to bad debt reserve was reasonable, because Edison Homes, by agreement with GECC, was liable only for principal. See infra note 7.

addition to its bad debt reserve as permitted by section 166(f). Its 1981 return was prepared by Hal Gensler, a CPA and tax preparer with a Minneapolis accounting firm. Gensler prepared the return based upon information supplied to him by Edison Homes. Since 1981 was a poor economic year, with high interest rates and growing unemployment, Edison Homes anticipated an increasing number of defaults and repossessions. It, therefore, calculated an addition to its current bad debt reserve. At the beginning of 1981, the reserve contained $246,128. Edison Homes calculated an addition by taking 3.25% of its total outstanding liability on its accounts with GECC, $23,820.059. This calculation produced a reserve of $774,152. Thus, less the reserve balance at the beginning of 1981, Edison

Homes added $528,024 to its bad debt reserve, and claimed a deduction for that amount.

The Commissioner found that Edison Homes improperly calculated the addition to reserve. The Commissioner found that Edison Homes based its calculations, in part, on its debt obligations to GECC arising from transactions other than the sale of tangible personal property as required by section 166(f)(1)(A), and, denied the deduction in full. The Commissioner also found that Edison Homes had been negligent in preparing its 1981 return. Thus, the Commissioner assessed a deficiency of $251,665, and an addition to tax, as a penalty, of $12,583 (five percent of the deficiency), plus fifty percent of the interest due on $251,665. See 26 U.S.C. § 6653(a)(2).

The case was tried to the tax court on May 21, 1987, and decision was entered on February 3, 1989. The tax court held that Edison Homes failed to meet its heavy burden of proving that the Commissioner had abused his discretion in disallowing the claimed deduction for the bad debt reserve. Edison Homes, Inc. v. Commissioner, 56 T.C.M. (CCH) 203, 207 (1988). Specifically, Edison Homes failed, according to the tax court, to prove that its reserve calculations were based only on debt obligations arising from sales, the tax court made a finding that Edison Homes acted as broker, and not as seller, as to all used mobile homes. Id. Based upon this failure of proof by Edison Homes, the tax court was unable to segregate actual sales from brokered transactions, and thus to determine

whether the calculation was reasonable. Therefore, the tax court could not say that the Commissioner's disallowance was an abuse of discretion. Id. The tax court also held that Edison Homes had been negligent in preparing its 1981 return. Id. at 207-08. Accordingly, the tax court found that the Commissioner properly assessed a penalty for negligence.

II. DISCUSSION

Secion 166 allows a taxpayer to take a deduction for losses incurred because of bad debts. Section 166(a) provides that a taxpayer may take a deduction for a debt which becomes worthless within the taxable year. In the alternative, sections 166(c) and

(f)[4] allow a taxpayer to take a deduction for a reasonable addition to a reserve established to cover future bad debts.[5] The statutory scheme clearly

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[4]Both sections were repealed effective December 31, 1986. Tax Reform Act of 1986, Pub. L. No. 99-514, Title VIII, §§ 805(a) and (b), 100 Stat. 2361 (1986).

[5]Section 166(c) provides:

> In lieu of any deduction under subsection (a), there shall be allowed (in the discretion of the Secretary) a deduction for a reasonable addition to a reserve for bad debts.

26 U.S.C. § 166(c).

Section 166(f) is a particular application of section 166(c), providing for a reserve for certain guaranteed debt obligations. Section 166(f) provides:

> (1) Allowance of deduction
>
> In the case of a taxpayer who is a dealer in property, in lieu of any deduction under subsection (a), there shall be allowed (in the discretion of the Secretary) for any taxable year ending after October 21, 1965, a deduction--

provides that the deduction for an addition to reserve is taken in lieu of a specific deduction for an actually worthless debt, see Beneficial Corp. & Subsidiaries v. United States, 814 F.2d 1570, 1571 (Fed. Cir. 1987), and is, therefore, subject to the discretion of the Commissioner. Since sections 166(c) and (f) allow a deduction for a loss which has not yet occurred, they afford a tax preference to the taxpayer; the taxpayer must otherwise take a deduction only when the loss has actually occurred. See Thompson v. Commissioner, 761 F.2d

(Continuation of [5])

> (A) for a reasonable addition to a reserve for bad debts which may arise out of his liability as a guarantor, endorser, or indemnitor or debt obligations arising out of the sale by him of real property or tangible personal property . . . in the ordinary course of his trade or business.

26 U.S.C. § 166(f)(1).

259, 261 (6th Cir. 1985). The reserve can only estimate the amount necessary to cover future losses on current debts. See Roth Steel Tube Co. v. Commissioner, 620 F.2d 1176, 1179 (6th Cir. 1980). By choosing the reserve method the taxpayer subjects himself to the discretion of the Commissioner. Beneficial Corp., 814 F.2d at 1573.

The United States Supreme Cou considered section 166(c) in Thor Power Tool Co. v. Commissioner, 439 U.S. 522 (1979). In Thor, the Court emphasized the statutory grant of discretion to the Commissioner. The Supreme Court held that the Commissioner's determination of a reasonable addition "must be sustained unless the taxpayer proves that the Commissioner abused his discretion. The taxpayer is said to bear a 'heavy

burden' in this respect. He must show not only that his own computation is reasonable but also that the Commissioner's computation is unreasonable and arbitrary." Id. at 548 (footnotes omitted). In effect, the statutory grant of discretion limits judicial review of the Commissioner's determination, Roth Steel, 620 F.2d at 1179, and the Commissioner's determination can be found unreasonable only if the taxpayer proves an abuse of discretion. See Dixie Furniture Co. v. Commissioner, 390 F.2d 139, 141 (8thCir. 1968); Beneficial Corp., 814 F.2d at 1572; Thompson, 761 F.2d at 261. Moreover, the focus is not solely on the reasonableness of the taxpayer's calculations. That is, that the taxpayer's calculations are reasonable does not necessarily mean that the

Commissioner's are unreasonable. Malone & Hyde, Inc. v. United States, 568 F.2d 474, 477 (6th Cir. 1978).

We cannot agree with Edison Homes that the Commissioner's disallowance of the deduction in this case was unreasonable. On appeal, Edison Homes argues, essentially, that the Commissioner's calculations were unreasonable because its own were reasonable. Given the economic conditions of 1981, and, in hindsight, its actual losses for 1981, Edison Homes argues that its addition to reserve was more than reasonable.[6] Edison Homes

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[6]In Thor, the Supreme Court defined a "reasonable addition" as "the amount necessary to bring the reserve balance up to the level that can be expected to cover losses properly anticipated on debts outstanding at the end of the tax year." Thor, 439 U.S. at 546.

does not dispute that it bears a heavy burden in proving that the Commissioner abused his discretion. Nor does Edison Homes argue that its addition can be based on obligations other than those arising from the sale of personal property as required by section 166(f)(1)(A). Because Edison Homes has not established that its calculations were based only on debt obligations arising from the sale of mobile homes, it has not proven that its addition was reasonable, let alone that the disallowance was an abuse of discretion by the Commissioner.

As indicated, section 166(f) requires that a reserve be based only on "debt obligations arising out of the sale . . . of . . . tangible personal property." 26 U.S.C. § 166(f)(1)(A) (em-

phasis added). Furthermore, the statute specifically excludes all debt obligations not arising from a sale: "Except as provided in paragraph (1), no deduction shall be allowed to a taxpayer for any addition to a reserve for bad debts which may arise out of his liability as guarantor, endorser, or indemnitor of debt obligations." Id. § 166(f)(2). Evidence presented at trial revealed that the $23 million debt obligation on which Edison Homes based its calculations contained obligations arising from brokered transactions in which Edison Homes was not the seller.

The record contains evidence of several transactions which Edison Homes referred to as "bird-dog" sales. Toberman testified that Edison Homes used "bird-dog" salespeople who would

find a home and a customer, and then involve Edison Homes to arrange financing. Trial Transcript at 69-70. As explained by Toberman: "We worked with several people that would look at homes for us, and if they were able to find a customer, we would just do a joint venture on a sale with them. And they would get a commission from us." Id. at 70. One such transaction, for example, was revealed by the testimony of James Freeman, the regional manager for GECC in Minnesota for part of 1981. Freeman testified that Edison Homes arranged financing through GECC, but that Edison Homes was not actually the seller of the mobile home. In some documents associated with this transaction, Walter and Madelene Kersten were listed as buyers, and Terry and Nancy Scruggs as sellers. Id. at 135-36; exhibit AO. In

others, Ardmor, Inc. was listed as seller. Id. at 139-40. Freeman, however, suggested that listing Ardmor, Inc. as seller did not accurately portray the transaction. He described this transaction as representative of others and stated: "And I became concerned as to using a standard retail contract to handle this type of transaction, versus a brokerage contract. Particularly where the title did not pass to the person signing as seller on the retail installment contract, the title never passed to their hands." Id. at 141. Toberman testified to a similar transaction involving a sale by Ronald and Gayle Myhre to James Smith. Id. at 81-83; exhibit 31. As with the Kersten transaction, the record contains a document, on Toberman Companies letterhead, which states that: "Ardmor,

Inc. is the Agent for placing financing with a lender with respect to the purchase of your mobile home from your dealer." Exhibit 31. Thus, various documents portrayed Ardmor, Inc. acting in different capacities. In the opinion of Freeman, these transactions were simply not sales. Trial Transcript at 142.

Based on the evidence of these and similar transactions, the tax court found that Edison Homes "acted merely as a mortgage broker (and possibly an escrow agent) for the sale of used mobile homes." Edison Homes, 56 T.C.M. (CCH) at 207. Hence, the tax court found that "an unascertainable portion of the $23 million proffered by petitioner as a basis for its dealer reserve represents accounts which did

not arise from sales by petitioner in the ordinary course of its business." Id. Edison Homes does not challenge this finding.

While counsel did state at oral argument that there is no evidence that these transactions were not sales, that assertion cannot refute the specific finding of the tax court. Indeed, it merely misstates the burden of proof. Nor is the argument that these transactions were only a few out of hundreds persuasive. The tax court found that Edison Homes acted as a broker in the case of all used mobile homes, and Edison Homes admitted at oral argument that many more of these transactions could be hidden in the $23 million figure on which it based its calculations. Given that the burden of

proof is on Edison Homes to prove that its calculations were based only on debt obligations arising from sales, and that Edison Homes has failed to do so, we cannot say that the Commissioner's disallowance of the deduction was unreasonable.[7]

Edison Homes also argues that the Commissioner's assessment of a penalty for negligence under section 6653(a) was

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[7]Even if Edison Homes had proved that its calculations were based only on debt obligations arising from sales, it would still be unable to prove that its calculations were reasonable. As the tax court found, the $23 million figure "does not represent petitioner's true potential liability to GECC." Edison Homes, 56 T.C.M. (CCH) at 207. The $23 million figure includes interest charges for which Edison Homes is not liable. As indicated, supra note 3, the record simply does not reveal principal-only figures for all dealer numbers with GECC. While Edison Homes tries to argue that its calculations would be reasonable even if its liability were only half of the $23 million, this argument again misstates the burden of proof.

improper.[8] The tax court found, however, that the deficiency in taxes paid in 1981 was due to negligence. We agree.

Edison Homes also bears the burden of proving that the Commissioner's

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[8]Section 6653(a) provides:

> (1) If any part of any underpayment . . . of any tax imposed . . . is due to negligence or intentional disregard of rules or regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment.
>
> (2) There shall be added to the tax (in addition to the amount determined under paragraph (1)) an amount equal to 50 percent of the interest payable under section 6601 --
>
> (A) with respect to the portion of the underpayment described in paragraph (1) which is attributable to the negligence or intentional disregard referred to in paragraph (1).

26 U.S.C. § 6653.

assessment of a penalty for negligence was improper. "The Commissioner's assessment of additions to tax, however, are entitled to a presumption of correctness and appellants bear the burden of proving that such determinations were improper." Page v. Commissioner, 823 F.2d 1263, 1272 (8th Cir. 1987), cert. denied, 484 U.S. 1043 (1988). The tax court's finding of negligence is subject to a clearly erroneous standard of review. Forseth v. Commissioner, 845 F.2d 746, 749 (7th Cir. 1988).

Edison Homes argues that it was not negligent because it merely interpreted a "rather obscure provision of law," brief for appellant at 36, differently than did the Commissioner. As the tax court held, however, section 166(f) is unambiguous. Edison Homes, 56 T.C.M.

(CCH) at 206. Section 166(f) clearly requires that any addition to reserve be based only on debt obligations arising from sales. Yet Edison Homes included in its calculations obligations arising from transactions in which it never had or transferred title to the mobile homes involved. We disagree that the law is unsettled as to whether such a transaction could in any way be considered a sale for purposes of section 166(f).

Alternatively, Edison Homes argues that it cannot be negligent because it relied on its accountant to prepare the 1981 return. Its accountant, however, merely calculated the reserve based on figures supplied by Edison Homes. Trial Transcript at 90-91, 95-97. As we held in Page, reliance on legal advice does not constitute proof that the Commis-

sioner's negligence determination was improper. Page, 823 F.2d at 1272. Cf. Scallen v. Commissioner, 877 F.2d 1364, 1371 (8th Cir. 1989) ("A taxpayer may not rely on errors of his tax preparer as a defense to a charge of fraud if the taxpayer failed to provide the preparer with the proper documentation correctly to prepare the return.") Given the state of this record, we can say without difficulty that the Commissioner's assessments for negligence were proper.

III. CONCLUSION

Edison Homes bore a heavy burden in this case to prove that the Commissioner abused his discretion in disallowing the deduction for an addition to reserve. Edison Homes has fallen well short of meeting this burden, for, given the tax court's finding of brokered transac-

tions, Edison Homes is unable to prove even that its own calculations were reasonable, let alone that the Commissioner's were unreasonable. For the reasons stated, the decision of the tax court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1708

Edison Homes, Inc., formerly Ardmor, Inc.,	*	
Appellant,	*	
vs.	*	Appeal from the United States Tax Court
Commissioner of Internal Revenue,	*	
Appellee.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 17, 1990

Order entered in accordance with opinion.

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1708

Edison Homes, Inc., formerly Ardmor, Inc.,	*	
Appellant,	*	
vs.	*	Appeal from the United States Tax Court
Commissioner of Internal Revenue,	*	
Appellee.	*	

The first line of the judgment entered May 17, 1990, contained a typographical error and the judgment is corrected to read as follows: "This appeal from the United States Tax Court...."

The Clerk of the United States Tax Court is directed to file the corrected judgment nunc pro tunc May 17, 1990.

October 4, 1990

A true copy.

ATTEST:

Clerk, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1708

Edison Homes, Inc., formerly Ardmor, Inc.,	*	
Appellant,	*	
vs.	*	Appeal from the United States Tax Court
Commissioner of Internal Revenue,	*	
Appellee.	*	

JUDGMENT

Nunc pro tunc May 17, 1990

This appeal from the United States Tax Court was submitted on the record of the tax court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the tax court in this cause is affirmed in accordance with the opinion of this court.

October 4, 1990

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1708

Edison Homes, Inc., formerly Ardmor, Inc.,	*	
Appellant,	*	
vs.	*	Order Denying Petition For Rehearing and
Commissioner of Internal Revenue,	*	Suggestion For Rehearing En Banc.
Appellee.	*	

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

July 9, 1990

Order entered at the direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.